IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1649

LLOYD F. EARLY, *Petitioner*

v.

PALM BEACH NEWSPAPERS, INC., GREGORY E. FAVRE, ROBERT H. KIRKPATRICK, JANE ARPE and TOM SAWYER, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA, FOURTH JUDICIAL DISTRICT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Lloyd F. Early, by and through his counsel, hereby petitions for a writ of certiorari to review the divided decision below of the Supreme Court of the State of Florida which leaves standing a reversal by the Florida District Court of Appeal, Fourth District, of a jury verdict and judgment favorable to Petitioner.

OPINIONS, ORDERS AND JUDGMENT BELOW

The order of the Supreme Court of the State of Florida declining to entertain jurisdiction either by way of appeal or on petition for a writ of certiorari, including the dissenting opinion thereto (App. A, *infra*), is not yet reported. Similarly, the Florida Supreme Court's order denying rehearing (App. B, *infra*) is unreported. The *per curiam* opinion of the

Florida District Court of Appeal, Fourth District, reversing a jury verdict in Petitioner's favor (App. C, *infra*), is reported at 334 So.2d 50 (Fla. 4 DCA 1976). That court's denial of rehearing (App. D, *infra*) is unreported. The judgment for Petitioner entered in the Circuit Court of the 17th Judicial Circuit of Florida, Broward County (App. E, *infra*), is not reported; nor is the trial court's memorandum decision denying defendants' several post-trial motions (App. F, *infra*).

JURISDICTION

The order of the Supreme Court of Florida issued on May 31, 1977 (App. A, *infra*). On December 22, 1977, the Florida Supreme Court denied a petition for rehearing (App. B, *infra*). On March 14, 1978, Mr. Justice Powell extended the time for filing the present petition for a writ of certiorari to and including May 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether the reversal below of a jury verdict in Petitioner's favor was premised on a misapplication of the standard announced by this Court in *New York Times* v. *Sullivan,* 376 U.S. 254, 84 S.Ct. 710 (1964), so as to unconstitutionally deprive Petitioner of due process of law and the judgment he had properly obtained pursuant to a jury verdict in the trial court.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment 1:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . .

U.S. Constitution, Amendment XIV, Sec. 1:

> . . . Nor shall any state deprive any person of life, liberty or property, without due process of law . . . .

STATEMENT

On August 5, 1970, Lloyd F. Early instituted the present action in the Circuit Court for Palm Beach County, Florida, against Palm Beach Newspapers, Inc. and four named reporters for one or another of the defendant company's three newspapers distributed throughout the Palm Beach area. The gravamen of the complaint was that over a period of some 14 months Respondents had persistently pursued a malicious newspaper campaign designed to force the removal of Petitioner from his elected position as Superintendent of Schools for Palm Beach County, Florida. Respondents admitted in print that "disposing of Lloyd Early is priority business". Respondents were charged with writing and publishing literally hundreds of derogatory articles (including a number of pejorative cartoons) which contained knowingly false and defamatory information about plaintiff's character, behavior, competence, actions and business relationships, all done with malice and in reckless disregard of the truth.

Following a reassignment of the case to the Circuit Court for Broward County, Florida, the matter was, by agreement of the parties, tried before a jury under the review standard announced by this Court in *New York Times* v. *Sullivan, supra.* The numerous newspaper articles and cartoons in question were placed into evidence, and substantial testimony was introduced to support Petitioner's assertion that Respondents had intentionally undertaken a campaign to de-

stroy public confidence in him as the Superintendent of Schools, and had dogmatically pursued that objective by knowingly publishing false information in reckless disregard of the truth, as stated by the trial judge in denying Respondents' post trial motions (See App. F, *infra*, p. 16a). After two weeks of trial, the court thoroughly instructed the jury on the law of libel in relevant part as follows:

> . . . You are instructed that as a public official, if you find by the evidence that any of these articles about a public official are libelous[;] that the official, the plaintiff, and [*sic*] if you find he has proven by clear and convincing evidence that the material was false and libelous, you must also prove by clear and convicing evidence that the defendants whom you may find against either published the material with actual knowledge that the material was false or published it with a reckless disregard for its truth or falsity.
>
> Reckless disregard, as the Courts have said, reckless disregard for truth or falsity means the defendants published the material with a high awareness of [*sic*] it was probably false or they had serious doubts about the truth of it when they published it. [Trial Tr. 1964-65].

The jury returned a verdict in favor of Petitioner in the amount of $950,000.00 compensatory damages, $25,000.00 punitive damages against Respondent Kirkpatrick and $25,000.00 punitive damages against Respondent Favre (see App. E, *infra*). Respondents then filed a series of post-trial motions seeking, alternatively, a mistrial, a judgment notwithstanding the verdict and a new trial. By order and memorandum decision issued on November 19, 1974, the trial court denied all three requests, stating *inter alia*:

> The Court further finds that the Plaintiff carried his burden of proof under the *New York Times* standard and proved his case by the clear and convincing weight of the evidence. *There is ample evidence in the record from which the jury could reasonably conclude that the Defendants clearly engaged in a campaign to "get" the Plaintiff. There was sufficient and substantial evidence from which a jury could reasonably conclude that many of their articles were published knowing of their falsity or with a high degree of awareness of their probable falsity.* [App. F, *infra*, p. 16a; emphasis added].

The Fourth District Court of Appeal of Florida reversed (App. C, *infra*). Acknowledging that "most of the articles and cartoons can fairly be described as slanted, mean, vicious, and substantially below the level of objectivity that one would expect of responsible journalism" (*id.* at 13a), the appeals court nonetheless absolved the Respondents of liability on the rationale that the defamatory information was in the nature of editorial opinions rather than factual reporting, and accordingly was entitled to a "free press" protection under the First Amendment of the Constitution regardless of how purposefully false or misleading the statements were (*id.* at 9a, 13a). To support its conclusion, the Florida District Court of Appeal selected "a smattering of the several hundred derogatory articles and cartoons" involved (*id.* at 13a), refused to recognize their significance, and rationalized the false and reckless materials on the grounds that they were either: (a) "matters of opinion, not statements of fact" (*id.* at 11a); (b) not as devastating an indictment of Petitioner's character when read in context as the language used might imply (*id.*); (c) "caustic and pejorative"

but with "a basis in fact and thus . . . not false" (*id*); (d) false, but only as a result of "defendants failure to investigate" (*id.* at 12a); or (e) "in the category of what the courts have chosen to call 'rhetorical hyperbole'" (*id.* at 13a).

Petitioner promptly petitioned for rehearing, arguing, *inter alia,* that the District Court of Appeal had failed to accord proper deference to the jury verdict, had ignored substantial evidence in the record supporting that verdict in reaching a contrary conclusion, and had, moreover, misapplied the *New York Times* v. *Sullivan* standard to overturn the verdict below. The petition for rehearing was denied on June 2, 1976 (App. D, *infra*). Thereafter, Petitioner sought review in the Supreme Court of Florida either by way of appeal or on petition for a writ of certiorari. On May 31, 1977, the Florida Supreme Court declined to entertain jurisdiction (App. A, *infra*). A petition for rehearing was timely filed by Petitioner, but this was also denied by the Florida Supreme Court by order dated December 22, 1977 (App. B, *infra*).

Petitioner now seeks review by this Court in the present petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

The reversal by the Fourth District Court of Appeal of Florida of a jury verdict in Petitioner's favor is based on a misapplication of this Court's decision in *New York Times* v. *Sullivan, supra.* The Fourth District Court of Appeal's decision is at variance with both the letter and spirit of *New York Times* v. *Sullivan, supra,* and is at variance with the numerous federal and state libel cases that have since reaffirmed the principles first announced therein. By exonerating the

Respondent newspapers and their reporters of responsibility for the calculated destruction of Petitioner's career through a "slanted", "mean" and "vicious" media campaign "admittedly designed to bring about the removal of Mr. Early from his elected position" (App. C, *infra,* 8a and 13a), the challenged decision has effectively bestowed upon the press the very "unconditional freedom" to criticize public officials that was urged *without success* in the concurring opinion in *New York Times* v. *Sullivan, supra,* 376 U.S. 293-305, 84 S. Ct. 733-39, and has consistently been rejected in this Court's subsequent rulings. See, *e.g., Rosenbloom* v. *Metromedia,* 403 U.S. 29, 52, 91 S. Ct. 1811, 1824 (1971); *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 348-49, 94 S. Ct. 2997, 3011 (1974).

Such an erosion and depreciation of the legal principles that have controlled libel cases as presented herein warrants full review on writ of certiorari. See Rule 19(1)(a) of the Rules of the Supreme Court of the United States.

The Florida District Court of Appeal has granted an absolute protection to libelous news commentary, no matter how vilifying or false, which can arguably fit within the category of editorial opinion rather than reportorial fact. Such a decision, if allowed to stand, is contrary to prior decisions of this Court and will undoubtedly serve to encourage further an emerging trend in this country towards irresponsible journalism, thereby tending to undermine, rather than to promote, the public's right to a wide-open but responsible debate on public issues in search for the truth about public affairs. That is, of course, the very essence of the First Amendment guarantee of a free press. See, *e.g., Thornhill* v. *Alabama,* 310 U.S. 88, 102, 60 S. Ct.

736, 744 (1940); *Rosenbloom* v. *Metromedia, supra,* 403 U.S. 41-42, 91 S. Ct. 1818; *St. Amant* v. *Thompson,* 390 U.S. 727, 732, 88 S. Ct. 1323, 1326 (1968).

One predictable consequence of removing all publishing accountability and responsibility will be that public officials will, out of caution, be chilled in the exercise of their public duties and in their public statements, lest they incur the displeasure of newspapers and news commentators and thus become the target of a campaign similar to that engaged in by the Palm Beach newspapers in the present case. Once aware that newspapers can publish, in news columns and with impunity under the guise of editorial opinion, defamatory material which is intentionally or recklessly false and misleading, public officials will inevitably be chilled and engage in self-censorship; the obvious result will be less free and open debate of public issues.

Certainly, if the libelous conduct here is not actionable, it is unlikely that there will ever be a recovery for libel and slander regardless of how outrageous the false and reckless publication may be. This point was well made by the trial court in denying Respondent's post-trial motions:

> The New York Times and succeeding cases have placed a heavy burden upon any public figure who claims a cause of action for libel. *If the protective umbrella of the New York Times and succeeding cases extends over Defendants who have acted as have Defendants in this cause, I would have to conclude that public officials are completely barred from successful libel actions.* . . . The Defendants' attorneys, in both their briefs and their oral argument, have frequently quoted the well known saying of the late President Truman with reference

> to politicians and their sensitivity to criticism, "If you can't stand the heat, stay out of the kitchen". *Certainly, public figures inure themselves to a reasonable amount of heat. However, a Defendant cannot set fire to a building and then claim the cook has no right to complain of the heat.* [App. F, *infra,* at 17a; emphasis added].

As this Court knows full well, the majority opinion in *New York Times* v. *Sullivan, supra,* carefully stopped short of absolving newspapers and reporters from all responsibility for false and misleading statements about public officials.[1] Without in any respect compromising the First Amendment protection accorded to the press (*New York Times* v. *Sullivan, supra,* 376 U.S. 268-80, 84 S. Ct. 719-26), the Court declared its milestone opinion in clear terms that the news media could, and indeed should, be held accountable for libelous and defamatory falsehoods relating to official conduct where it could be shown "that the statement[s] [were] made with 'actual malice'—that is, with knowledge that [they were] false or with reckless disregard of whether [they were] false or not" (376 U.S. 279-80, 84 S. Ct. 726). See also *St. Amant* v. *Thompson, supra,* 390 U.S. 731, 88 S. Ct. 1325. To allow the decision of the Florida District Court of Appeal to stand is to seriously undermine the milestone decision of *New York Times* v. *Sullivan, supra.*

Notably, this controlling standard was *not* announced in qualifying terms which excused malicious reporting that could be classified as editorial opinion, while leaving vulnerable to attack intentional defamatory falsehoods said to be only reportorial and factual in nature.

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[1] See also *Gertz* v. *Robert Welch, Inc., supra,* 418 U.S. at 341-42, 94 S. Ct. at 3007-09.

Compare *Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245, 95 S. Ct. 465 (1974). Indeed, the very context in which *New York Times* v. *Sullivan* was decided belies any such formalistic distinction. There, the Court had before it what could only be characterized as an "editorial advertisement", *i.e.*, one which "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support . . ." (376 U.S. 266, 84 S. Ct. 718). Certainly, if a showing of "actual malice" in that case would have provided a basis for recovery against intentional or reckless falsehoods expressed through the medium of advertising, so, too, should the reporters and publishers in the present case be held accountable for their defamatory cartoons and editorials which, as proven below, they either knew or should have known lacked a foundation in truth.

For it is neither the form (*i.e.*, opinion vs. fact) nor the character (*i.e.*, truth vs. falsity) of expression that is a measure of the constitutional protection afforded to defamatory remarks by the press corps (see *New York Times* v. *Sullivan*, 376 U.S. 271-79, 84 S. Ct. 721-25). Rather, the test is whether the statements made or opinions given were done with actual malice as defined by this Court. Therefore, the First Amendment safeguards for free and open criticism by the press of public officials do not provide an absolute haven against an award of damages in actions for libel and slander.

This conclusion is fully supported by the more recent decisions by this and other courts. The several opinions in *Rosenbloom* v. *Metromedia, supra*, demonstrate clearly the lack of concern that this Court has had with regard to whether the defamatory falsehoods might be characterized as opinion or fact. As Mr. Justice Brennan concluded for the *Rosenbloom* plurality "*all discussion and communication* involving matters of public and general concern" (403 U.S. 44, 91 S. Ct. 1820; emphasis added) must meet the test enunciated in *New York Times* v. *Sullivan, supra.*

Thus, news articles designed to place the subject in a "false light" by sprinkling factual reports with derogatory editorial comment have been held to be actionable conduct. See *Cantrell* v. *Forest City Publishing Co., supra; Varnish* v. *Best Median Publishing Co.*, 405 F.2d 608, 611-12 (2d Cir. 1968), *cert. denied,* 394 U.S. 987, 89 S. Ct. 1465 (1969). Similarly susceptible to attack are newspaper campaigns aimed at maligning the character of a public official through false innuendo, accusation and influence. See *Ginzburg* v. *Goldwater,* 414 F.2d 324 (2d Cir. 1969), *cert. denied,* 396 U.S. 1049, 90 S. Ct. 1085 (1970); *Ragano* v. *Times, Inc.,* 302 F. Supp. 1005, 1010 (D.C. Fla. 1969), *affirmed,* 427 F.2d 219 (5th Cir. 1970); *Clay Communications, Inc.* v. *Sprouse,* 211 S.E.2d 674 (W. Va. Sup. Ct. 1974), *cert. denied,* 423 U.S. 882, 96 S. Ct. 145 (1975). Moreover, where such character assassinations have been undertaken without first making a reasonable effort to investigate the truth or falsity of the underlying charges, and they are shown to be irresponsibly false, the First Amendment protection has been recognized as unavailing. See, *e.g., Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 157-58, 87 S. Ct. 1975, 1992 (1967).

The decision by Respondents to "get" Lloyd Early, embarked them on a zealous program of excessive publication demonstrating Respondents' failure to investigate properly despite having serious doubts regarding the truthfulness of their publications. "Publishing

with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice". *St. Amant* v. *Thompson, supra,* 731.

Contrary to the decision of the Florida District Court of Appeal below (App. C, *infra,* at 9a-10a), this Court's opinion in *Gertz* v. *Robert Welch, Inc., supra,* does not suggest that the foregoing line of authority has no application to cartoons or editorial opinion. Even though Mr. Justice Powell stated that "[u]nder the First Amendment there is no such thing as a false idea" (418 U.S. 340, 94 S. Ct. 3007), that certainly does not provide newspapers with a license to denigrate the character of public officials by expressing defamatory opinions which are known to be without factual basis and depend for their pronouncement on a reckless disregard for truth. As this Court observed in *Garrison* v. *State of Louisiana,* 379 U.S. 64, 75, 85 S. Ct. 209, 216 (1964), a case involving personal attacks through the press on the integrity and honesty of a number of judges:

> Calculated falsehood falls into that class of utterance which "*are of no essential part of any essential part of any exposition of ideas,* and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." . . . *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 572, 62 S. Ct. 766, 769, 86 L.Ed. 1031. *Hence, the knowingly false statements made with reckless disregard of the truth, do not enjoy constitutional protection.* [Emphasis added].

It is from this perspective that we urge review by this Court of the present case. That the Palm Beach newspapers "through their respective *editorial and*

news reporters, embarked upon a concerted campaign admittedly designed to bring about the removal of Mr. Early from his elected position" (App. C, *infra,* at 8a; emphasis added) is not a matter of dispute. Nor is it questioned that "[i]n pursuance of this objective, the defendants published over a period of approximately fourteen months several hundred *news articles and editorials,* all of which were generally hostile to or critical of Mr. Early *and many of which were of a defamatory nature*" (*id.;* emphasis added). In describing the tactics used, the Florida District Court of Appeal specifically stated that "most of the articles and cartoons can fairly be described as slanted, mean, vicious and substantially below the level of objectivity that we would expect of responsible journalism . . ." (App. C, p. 13a).

The jury, under proper instructions derived from the standard in *New York Times* v. *Sullivan, supra,* found as a fact that the campaign was carried out with "actual malice". There was more than sufficient evidence introduced to show that the articles discussing Petitioner's "*ineptness, incompetence* and *indecisiveness*" (App. C, *infra,* at 11a; emphasis in original)—whether viewed as "matters of opinion" or "statements of fact" (*id.*)—were utterly without factual basis. The references to Mr. Early "*cheating*", "*stealing from the public*" and having his "*fingers in the pot*" (*id.*; emphasis in original)—whether understood as connoting "thievery" or "incompetent intervention" (*id.*)—were also shown at trial to be false. Similarly, specific news stories and cartoons which the Florida District Court of Appeal recognized as "caustic and pejora-

tive" (*id.*) were entirely inaccurate.[2] The same can be said for the "series of articles [accusing] plaintiff of nepotism" (App. C, *infra,* at 12a). Indeed, as to this latter matter, the chairman of the school board, to whom the charge of nepotism was attributed, testified not only that he was neither the source of, nor a contributor to, these stories, but that the reporters who interviewed him had suggested and pressed the charge of nepotism during the interview; and then had subsequently attributed their own remark regarding nepotism to the school board chairman. Such reckless disregard for the truth cannot properly be dismissed, as did the court below (*id.*), as nothing more than "defendants' failure to investigate".

In sum, it is a clear case of misapplication of federal law that we bring to this Court. In addition to the "smattering" (App. C, *infra,* at 13a) of articles reviewed by the Florida District Court of Appeal, there were hundreds of other articles falsely accusing Mr. Early of misdeeds ranging from incompetence to theft

[2] The trial judge so found in precise terms: "There was sufficient and substantial evidence from which a jury could reasonably conclude that many of their articles were published knowing of their falsity or with a high degree of awareness of their probable falsity" (App. F, *infra,* at 16a). Thus, at no time did the school board strip Mr. Early of his power; the reference to Mr. Early as a "former trucker" was false and misleading; the criticism with regard to Mr. Early's use of educational TV was by no means limited to his speech to school employees, but was widespread and in almost all respects unfounded; the reports and cartoons relating to what was represented to be Mr. Early's planned firing of four hundred members of the instructional staff were totally without factual basis. The same can be said for the articles and cartoons dismissed by the Florida District Court of Appeal as mere "rhetorical hyperbole". The evidence confirmed that the only individuals "clamoring for new leadership in the school system" (App. C, *infra,* at 13a) were the reporters themselves, not the public at large as the articles implied.

which the jury examined to ascertain whether the campaign against this Petitioner was conducted with actual malice and in reckless disregard for the truth. The triers of fact were so persuaded in this regard that they returned a verdict not only for compensatory damages, *but for punitive damages as well* (App. E, *infra*). The soundness of this determination was fully confirmed by the trial judge who had equal exposure to all the documents introduced and all the testimony offered (App. F, *infra*). His conclusion bears repeating:

> If the protective umbrella of the New York Times and succeeding cases extends over Defendants who have acted as have the Defendants in this cause, I would have to conclude that public officials are completely barred from successful libel actions. [App. F, *infra* at 17a].

We agree with that assessment. The reversal of this case by the Florida Court of Appeal depends largely on their erroneous conclusion that editorial opinion, even when mixed with news stories, enjoys a constitutional protection under the First Amendment that is not accorded to merely factual reporting by newsmen. If this Court had intended *New York Times* v. *Sullivan, supra,* to be so interpreted, it is unthinkable that a showing of "actual malice" would have been adopted as the touchstone for liability in libel cases involving public officials. That standard necessarily contemplates reporting which is "opinionated", rather than objective. It requires a showing that the press has purposefully "slanted" the facts in a manner which is known to be false, or which is recklessly indifferent to the truth. Such is precisely the showing that was made by Petitioner in the present case, and the reversal below of his jury award for compensatory and punitive

damages resulting from Respondents' "slanted, mean, vicious" and admittedly irresponsible newspaper campaign (App. C, *infra,* at 13a) is constitutionally impermissible. See U.S. Constitution, Article XIV, Section 1.

The Fourth District Court of Appeal incorrectly concluded that under present law only a false statement of fact made with "actual malice" could suffice for a libel action brought by a public official. We contend that is not the law as stated by this Court, and that this misapplication of *New York Times* v. *Sullivan, supra,* and its progeny provides a basis for future claims of absolute immunity by newspapers, a concept which this Court has rejected as unacceptable.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 20, 1978

APPENDIX

APPENDIX A

SUPREME COURT OF FLORIDA

TUESDAY, MAY 31, 1977

Consolidated Cases
49,650 (appeal)

CASE Nos. 49,625 (certiorari)

DISTRICT COURT OF APPEAL, FOURTH DISTRICT

74-1729—75-116

LLOYD F. EARLY, *Appellant, Petitioner,*

vs.

PALM BEACH NEWSPAPERS, INC., ETC., ET AL.,
Appellees, Respondents.

The Court having determined that it is without jurisdiction, it is ordered that the appeal, case no. 49,650, be and is hereby dismissed sua sponte.

Case No. 49,625 having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

Vote for case no. 49,650 (appeal):

OVERTON, C.J., ADKINS, BOYD, ENGLAND, SUNDBERG, AND HATCHETT, J.J., CONCUR.

Vote for case no. 49,625 (certiorari):

OVERTON, C.J., BOYD, ENGLAND, SUNDBERG, AND HATCHETT, J.J., CONCUR. ADKINS, J., DISSENTS WITH OPINION.

A True Copy

TEST:

/s/ Sid J. White
Clerk Supreme Court.

ADKINS, J., dissenting.

Conflict does exist with several decisions cited by the petition, and accordingly this Court should exercise its discretion and assume jurisdiction of the cause to resolve the conflict and to dispose of the issues on the merits.

Petitioner, elected County Superintendent of Public Instruction of Palm Beach County, was successful in the trial court in an action for libel against respondents. A jury verdict awarded him $1,000,000 in compensatory and punitive damages, and final judgment was entered thereon. As appears from the District Court of Appeals, Fourth District, decision under review, respondents, two daily newspapers in Palm Beach, their editors and a reporter from each, embarked upon a concerted campaign admittedly designed to bring about the removal of Mr. Early from his elected position, and, in pursuance of said objective, published over a period of approximately fourteen months several hundred news articles and editorials, all of which were generally hostile to or critical of Early and many of which were defamatory.

In an order denying respondents' motion for new trial, motion for mistrial and motion for J.N.O.V., the trial court explained:

> "The court finds that the jury was properly instructed relative to the defendants' privilege under the doctrine enunciated in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964) and its progeny of cases. The court further finds that the plaintiff carried his burden of proof under the *New York Times* standard and proved his case by the clear and convincing weight of the evidence. There is ample evidence in the record from

> which the jury could reasonably conclude that the defendants clearly engaged in a campaign to 'get' the plaintiff. There was sufficient and substantial evidence from which the jury could reasonably conclude that many of their articles were published knowing of their falsity or with a high degree of awareness of their probable falsity."

Upon appeal, the District Court of Appeal, Fourth District, reversed on the ground that the petitioner had not carried his burden of showing by clear and convicing evidence that the defamatory statements were made with knowledge of their falsity.

Petitioner submits that the subject District Court of Appeal, Fourth District, decision creates a new rule of law which permits the District Court to reweigh the evidence, retry the case, and generally substitute its judgment for that of the trial court. The Fourth District Court's decision does conflict with several decisions cited by petitioner to the effect that an appellate court is not free to substitute its judgment for the trier of fact or to reweigh the evidence and reach a different conclusion than the trial court, *Crane & Crouse, Inc.* v. *Palm Bay Towers Corp.*, 326 So.2d 182 (Fla. 1976), and to the effect that the existence or nonexistence of malice where the facts are controverted and there is evidence on the subject is a jury question. *Coogler* v. *Rhodes*, 21 So. 109 (Fla. 1897), *Montgomery* v. *Knox*, 3 So. 211 (Fla. 1887), *Myers* v. *Hodges*, 44 So. 357 (Fla. 1907), *Firestone* v. *Time, Inc.*, 305 So.2d 172, cert. granted 95 S.Ct. 1557.

Cape Publications, Inc. v. *Adams*, —— So.2d —— (Fla. 4th DCA), opinion filed August 27, 1976, was an appeal from substantial verdicts and judgments in a libel action. In considering the evidence "in the light most favorable to the verdict," the court held that there was

> "[C]lear and convincing support for a finding that appellant exhibited a reckless disregard of whether the charges were true or false, i.e., that they published the articles with a high degree of awareness of the probable falsity of the statements involved."

In the case *sub judice*, the defendants accused plaintiff of "cheating," and "stealing from the public," and that he had his "fingers in the pot." The District Court recognized that these charges, if false and made with knowledge with such falsity or with reckless disregard of the truth thereof, would be actionable. The court then said:

> "However, in proper context the statements which defendants actually made do not carry the implication suggested by plaintiff. The first article referred to an editorial in which the newspaper asserted that the public and the school board had been *cheated by Mr. Early's lack of leadership,* while the second article stated in an editorial that 'Mr. Below sits on the sideline doing what he can when Mr. Early's fingers aren't in the *pot'—implying not thievery, but incompetent intervention* in the operation of the school system. Taken in proper context, no reader of the newspaper articles could have thought that the newspaper was charging Early with the commission of any criminal offense."

The question of whether a reader of the newspaper thought that the newspaper was charging plaintiff with the commission of a criminal offense was clearly a jury question. In this respect the District Court substituted its judgment for that of the jury and the trial judge. If statements which are published have a different effect on the common mind of the reader than that which the truth would have, then the jury is authorized to return a verdict for the plaintiff. *McCormick* v. *Miami Herald Publishing Co.,* 139 *Co.,* 139 So.2d 197, 200 (Fla.2d DCA 1962); *Hammond* v. *Times Publishing Co.,* 162 So.2d 681, 682 (Fla.2d DCA

1964); *Layne* v. *Tribune Company,* 146 So. 234, 238 (Fla. 1933); *Johnson* v. *Finance Acceptance Co.,* 159 So. 364 (Fla. 1935); *Joopanenco* v. *Gavagan,* 67 So.2d 434 (Fla. 1953); *Campbell* v. *Jacksonville Kennel Club,* 66 S.2d 495 (Fla. 1953); *Commander* v. *Pedersen,* 156 So. 337 (Fla. 1934).

There is clear conflict and we should assume our responsibility and accept jurisdiction.

APPENDIX B

THURSDAY, DECEMBER 22, 1977

(CAPTION OMITTED IN PRINTING)

On consideration of the petition for rehearing filed by attorneys for petitioner/appellant,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

OVERTON, C.J., BOYD, ENGLAND, SUNDBERG and HATCHETT, JJ., Concur. ADKINS, J., Dissents.

A True Copy

TESTS:

/s/ SID J. WHITE
Clerk Supreme Court

APPENDIX C

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JANUARY TERM, 1976

CASE NOS. 75-116, 74-1729

PALM BEACH NEWSPAPERS, INC., a Florida corporation, GREGORY FAVRE, R. H. KIRKPATRICK, TOM SAWYER and JANE ARPE, *Appellants,*

v.

LLOYD F. EARLY, *Appellee.*

Opinion filed April 23, 1976.

Consolidated appeals from the Circuit Court for Broward County; Victor O. Wehle, Judge.

Harold B. Wahl of Wahl and Gabel, Jacksonville, Cecil H. Albury of Brennan, McAliley, Albury and Hayskar, West Palm Beach, and John F. Law, North Palm Beach, for appellants.

Joseph D. Farish, Jr. of Farish & Farish, West Palm Beach, for appellee.

PER CURIAM.

Lloyd F. Early, the elected County Superintendent of Public Instruction of Palm Beach County, brought an action for libel against Palm Beach Newspapers, Inc., the publisher of two daily newspapers, and certain members of the editorial and news staff of those two newspapers. A jury verdict awarded Early a total of $1,000,000 in compensatory and punitive damages, and from the judgment entered thereon the defendants have appealed. This is Case No. 74-1729. The trial has been delayed for nearly two years while defendants sought certiorari review of an order requiring the corporate defendant to disclose certain financial

information. Defendants had posted a bond conditioned to pay all costs and damages occasioned by the delay. Subsequent to verdict and final judgment, plaintiff sought to recover on the bond asserting entitlement to two years' interest on the judgment as his damages for the delay. The postjudgment order denying plaintiff's motion and granting the defendants' motion to discharge the bond is the subject of an interlocutory appeal, Case No. 75-116. We affirm the latter order, and, for reasons hereafter set forth, reverse, the judgment in Case No. 74-1729.

At all times material to this cause of action, Lloyd F. Early was a public official. The corporate defendant published two daily newspapers in Palm Beach County, the Palm Beach Post, a morning paper, and the Palm Beach Times, an evening paper. Defendants-Favre and Sawyer were editor and reporter respectively for the Post, defendants—Kirkpatrick and Arpe editor and reporter respectively for the Times. Both papers, through their respective editorial and news staffs, embarked upon a concerted campaign admittedly designed to bring about the removal of Mr. Early from his elected position. In pursuance of this objective, the defendants published over a period of approximately fourteen months several hundred news articles and editorials, all of which were generally hostile to or critical of Early and many of which were of a defamatory nature.

Although the defendant/appellants have raised a number of points on this appeal, we find merit only as to those relating to (1) the sufficiency of the evidence, (2) the correctness of certain jury instructions, and (3) the gross excessiveness of the verdict. However, because we conclude that the evidence is legally insufficient to sustain the verdict and the judgment entered thereon, we dispose of the case on that point alone, making it unnecessary to discuss the remaining meritorious points.

This case is governed squarely by New York Times Company v. Sullivan, 376 U.S. 254 (1964) and its progeny. In the *New York Times* case, the court defined a constitutional privilege intended to free criticism of public officials from the restraints imposed by the common law of defamation:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (376 U.S. at 279-80)

This standard, applicable to appellee—Lloyd F. Early as a public officer, has been explicated in later cases. In Garrison v. Louisiana, 379 U.S. 64 (1964), it was said, at 74, "only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions." As stated in a footnote in Gertz v. Robert Welsh, Inc., 418 U.S. 323 (1974) (footnote 6 at 334):

> "In St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968), the Court equated reckless disregard of the truth with subjective awareness of probable falsity: 'There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.'"

Malice in the traditional common law sense of sinister or corrupt motive such as hatred, ill will, spite, enmity or a wanton desire to injure has been distinguished from actual malice as employed in the *New York Times* standard relating to a public official—knowledge of falsity or reckless disregard of the truth. See, Beckley Newspapers Corp. v.

Hanks, 389 U.S. 81 (1967); Garrison v. Louisiana, supra; Henry v. Collins, 380 U.S. 356 (1965); Rosenblatt v. Baer, 383 U.S. 75, 84 (1966); Greenbelt Cooperative Publishing Ass'n., Inc. v. Bresler, 398 U.S. 6, 9-11 (1970). Additionally, it has been stated that those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. Gertz v. Robert Welsh, Inc., supra, at 342.

The Gertz case, supra, also made clear that the defamatory falsehood referred to in the *New York Times* standard refers to a statement of fact as opposed to pure comment or opinion:

> "We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." (418 U.S. at 339-40)

It thus appears that under the present state of the law concerning an action for libel by a public official, the plaintiff has the burden of showing by clear and convincing evidence that the defamatory statement was (1) a statement of fact, (2) which was false, and (3) made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. We conclude from our examination of the briefs and those portions of the record to which our attention has been directed, that the plaintiff/appellee did not meet that burden as is illustrated by the following sampling of the various articles of which plaintiff complained.

Plaintiff/appellee complained that the defendants characterized his tenure in office as *unsuccessful*, and stated that he was unfit to hold the office of Superintendent of Public

Instruction because of his *ineptness, incompetence* and *indecisiveness*. All of these charges were clearly matters of opinion, not statements of fact, and were proper subject of comment on a public official's fitness for office.

Plaintiff/appellee complained that defendants accused him of *cheating* and *stealing from the public* and that he had his "*fingers in* the pot." A charge of cheating or stealing, if false and made with knowledge of such falsity or with reckless disregard for the truth thereof, would certainly be beyond the constitutional privilege established by the *New York Times* standard. However, in proper context the statements which defendants actually made do not carry the implication suggested by plaintiff. The first article referred to an editorial in which the newspaper asserted that the public and the school board had been *cheated by Mr. Early's lack of leadership*, while the second article stated in an editorial that "Mr. Below sits on the sideline doing what he can when Mr. Early's fingers aren't in the pot"—*implying, not thievery, but incompetent intervention* in the operation of the school system. Taken in proper context, no reader of the newspaper articles could have thought that the newspaper was charging Early with the commission of any criminal offense. Cf. Greenbelt Cooperative Publishing Assn'n., Inc. v. Bresler, supra.

Many of the written articles and cartoons, caustic and pejorative as they were, nonetheless had a basis in fact and thus were not false: defendants reported that the school board had stripped Mr. Early of his power (on that occasion plaintiff had been directed by a majority of the five-member school board to let the Deputy Superintendent, Mr. Below, run the system); defendants described plaintiff, a holder of two Masters Degrees in education, as a "former trucker" (but by Mr. Early's own admission he had at one time worked for a small trucking firm); defendants published an article stating that plaintiff had made improper use of an educational TV system by making a speech to

school employees in which he defended himself against his critics (but such use was contrary to regulation and Mr. Early was criticized in this respect by some members of the school board and by the State Superintendent of Public Instruction); defendants reported that plaintiff planned to fire four hundred members of the instructional staff and a cartoon depicted plaintiff chopping off heads while surrounded by Lizzy Borden, Henry VIII, and Jack the Ripper (but this is more a matter of semantics since, at the school board meeting from which these matters originated, plaintiff had submitted a plan for cutting down by approximately four hundred the number of new teachers to be hired in the next year and at that meeting one of the school board members had himself suggested that the action compared with that of Lizzy Borden, Henry VIII and Jack the Ripper); defendants reported that plaintiff was seeking a position with the federal government (and in fact Mr. Early had submitted an application for such a position).

A series of articles accused plaintiff of nepotism. They dealt with employment of plaintiff's wife, a registered nurse, in the school system. She had been so employed before Mr. Early came to office and thus in this sense the charge was false. However the series of articles relative to this matter were based primarily on information furnished by the then chairman of the school board, who had told defendants that he assumed plaintiff had recommended his wife for the school position since he, the school board chairman, had been informed that the plaintiff's predecessor had not recommended Mrs. Early for her part-time job with the school system. There was no evidence to show that the defendants had accused plaintiff of nepotism with knowledge of the falsity of the charge or with a high degree of awareness of its probable falsity. There was, at the most, only proof of defendants failure to investigate, which without more, cannot establish reckless disregard for the truth. Gertz v. Robert Welsh, Inc., supra, at 332.

Most of the articles and cartoons would fall in the category of what the courts have chosen to call "rhetorical hyperbole" or "the conventional give and take in our economic and political controversies." In this category were statements to the effect that public confidence in the school system was eroding, that the public was clamoring for new leadership in the school system, that plaintiff enjoyed TV and news exposure, that plaintiff had not, prior to his election, held an administrative position in the school system higher than acting principal, and such cartoons as depicted the school buildings falling down or crumbling under plaintiff's leadership, as typical examples.

We do not here attempt to discuss or classify more than a smattering of the several hundred derogatory articles and cartoons which defendants published of and concerning plaintiff. Suffice it to say that while most of the articles and cartoons can fairly be described as slanted, mean, vicious, and substantially below the level of objectivity that one would expect of responsible journalism, there is no evidence called to our attention which clearly and convincingly demonstrates that a single one of the articles was a false statement of fact made with actual malice as defined in the *New York Times* case. We thus conclude that the defendants' motion for a directed verdict at the close of the evidence should have been granted by the trial court. The judgment is therefore reversed and the cause remanded with directions to enter a judgment in favor of the defendants.

REVERSED and REMANDED.

WALDEN, C.J., OWEN, J., and STRAWN, DAVID U., Associate Judge, concur.

APPENDIX D

(Caption Omitted in Printing)

June 2, 1976

Ordered that the Appellee's May 7, 1976 Petition for Rehearing and Motion to Certify Question as Being of Great Public Interest is hereby denied.

A True Copy

/s/ Emmett J. Comiskey
Emmett J. Comiskey
Clerk

APPENDIX E

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR BROWARD COUNTY.

No. 71-10447—Wehle

Lloyd F. Early, *Plaintiff*,

vs.

Palm Beach Newspapers, Inc., a Florida corporation, Gregory E. Favre, R. H. Kirkpatrick, Tom Sawyer and Jane Arpe, *Defendants*.

Final Judgment for Plaintiff

Pursuant to the verdict rendered in this action,

It Is Adjudged that the Plaintiff, Lloyd F. Early, recovers from the Defendants, Palm Beach Newspapers, Inc., Gregory E. Favre, R. H. Kirkpatrick, Tom Sawyer and Jane Arpe, the sum of $950,000.00 as compensatory damages, and that the Plaintiff, Lloyd F. Early, recovers from the Defendant, Gregory E. Favre, the sum of $25,000.00 as punitive damages, and that the Plaintiff, Lloyd F. Early, recovers from the Defendant, R. H. Kirkpatrick, the sum of $25,000.00 as punitive damages, besides his costs in his behalf expended, to be taxed by special order of the Court. Execution is withheld until time has expired for filing motion for new trial or a motion for new trial has been ruled upon.

Ordered this the 28th day of August, A. D., 1974.

/s/ Victor O. Wehle
Circuit Judge

APPENDIX F

(Caption Omitted in Printing)

Order Denying Defendants' Motion for Mistrial and Motion for Judgment Notwithstanding Verdict or in the Alternative for New Trial, and Plaintiff's Motion to Strike

This Cause came on to be heard on the post-trial motions of the Defendants after Verdict and Final Judgment have been entered for the Plaintiff. The Defendants have filed with this Court a Motion for Mistrial and a Motion for Judgment Notwithstanding Verdict or in the Alternative for New Trial. The Plaintiffs have filed a Motion to Strike Defendants' Post-Trial Motions. The Court has heard argument of counsel and after having carefully studied very comprehensive and scholarly briefs provided by all counsel, and being fully advised in the premises, the Court finds:

1. The Plaintiff's Motion to Strike is without merit.

2. With reference to the Motion for Mistrial, there has been no showing of any prejudicial error.

3. With reference to the Motion for Judgment Notwithstanding Verdict or in the Alternative for New Trial, the Court finds that the jury was properly instructed relative to the Defendants' privilege under the doctrine enunciated in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964) and its progency of cases. The Court further finds that the Plaintiff carried his burden of proof under the *New York Times* standard and proved his case by the clear and convincing weight of the evidence. There is ample evidence in the record from which the jury could reasonably conclude that the Defendants clearly engaged in a campaign to "get" the Plaintiff. There was sufficient and substantial evidence from which a jury could reasonably conclude that many of their articles were published knowing of their falsity or with a high degree of awareness of their probable falsity.

The New York Times and succeeding cases have placed a tremendous burden upon any public figure who claims a cause of action for libel. If the protective umbrella of the New York Times and succeeding cases extends over Defendants who have acted as have the Defendants in this cause, I would have to conclude that public officials are completely barred from successful libel actions. I cannot and will not accept this unless and until an Appellate Court so directs. The Defendants' attorneys, in both their briefs and their oral argument, have frequently quoted the well-known saying of the late Persident Truman with reference to politicians and their sensitivity to criticism, "If you can't stand the heat, stay out of the kitchen". Certainly, public figures must inure themselves to a reasonable amount of heat. However, a Defendant cannot set fire to a building and then claim that the cook has no right to complain of the heat.

4. The Court further finds that the alleged non-constitutional basis for an award of a new trial are without merit.

Thereupon It Is Ordered and Adjudged:

1. The Defendants' Motion for Mistrial is denied.

2. The Defendants' Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial is denied.

3. The Plaintiff's Motion to Strike Defendants' Post-Trial Motions is denied.

Done and Ordered this the 19th day of November. A.D. 1974.

/s/ Victor C. Wehle
Circuit Judge